

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,708

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social and Rehabilitation Services denying her eligibility for a child care subsidy. The issue is whether the petitioner's husband is engaged in qualifying self-employment as the term is defined in the regulations governing child care payments.

FINDINGS OF FACT

1. The petitioner and her husband live with and care for their two preschool-aged children. The petitioner is a full-time student in the process of completing her certification for teaching art in grades K-12. Her husband has his own business building log homes.
2. The petitioner first applied for and was found eligible to receive child care subsidy payments in 1992. At that time she was a student and her husband was unemployed. They were found eligible based upon her training need and his unemployment. In December of 1992, the petitioner's husband, who was trying to start a construction business, formulated a self-employment plan and signed a start-up agreement with SRS.
3. During 1993, the petitioner's husband pursued his employment in the home construction business but netted only \$705 due to large start up costs and little business. However, upon review in January of 1994, he was found to have met the requirements of his start-up program and the family was continued on day care benefits. He was reviewed again in May of 1994 and continued on benefits even though he had no reportable income from his self-employment for the first quarter of 1994. SRS asserts that the family should have been terminated based on that information but was not due to administrative error. SRS is not attempting to recoup any overpaid benefits for that period.
4. In November of 1994, the petitioner's eligibility was reviewed and her husband was asked to provide a new self-employment plan. He provided that plan and continued his self-employment in the construction business but also worked when he could as an independent contractor for a bakery business.

5. On March 1, 1995, the petitioner was sent a letter by SRS which asked as part of a "review application" that she provide:

Two of your most recent pay stubs or a letter from your employer stating gross weekly wages.

If self-employed, your most recent Income Tax Return (Including Schedule C)

6. The petitioner interpreted this letter as requiring her to elect one of the above methods of income verification and responded by providing copies of two checks written to her husband from a bakery where he was then employed as an independent contract worker. The first check dated February 14, showed a payment to the petitioner's husband from the bakery of \$230, and the second, dated February 21, 1995, showed a payment of \$230.85.

7. In response to this information, the Department mailed the petitioner a request for verification which stated that she must provide by March 20, 1995:

Verification of gross income for [husband], i.e. Two most recent pay stubs, employer's statement of gross earnings, current income tax forms with appropriate schedules, ANFC award letter.

The underlining was done by hand and, in addition, the

following handwritten note was appended: "need gross amount

before deductions."

8. On March 15, 1995, the petitioner responded to that request as follows:

I have received notice that you request [husband's] gross earnings before deductions in his employment at [the bakery]. [Husband] has been hired as a contract worker, not a salaried employee. Therefore, it is [husband's] earnings (the checks) that must be his gross payment. He was to pay income taxes on these checks in the 1995 tax.

However, [husband's] time at [the bakery] has been reduced due to lack of need. At this time he is not working there, but may continue as demand increases. I will let you know of any changes.

9. On March 29, 1995, SRS sent back a message stating:

If your husband is not working at the present time he is able to care for the children. If he is working I need current verification of that.

10. On April 9, 1995, the petitioner replied:

As of one month ago, my husband [name] has no longer worked at [the bakery]. To compensate for this loss, he is actively searching for employment elsewhere, as well as has hopes for marketing his skills to work as an independent subcontractor. His days are full in this pursuit.

As soon as this status changes, I will inform Child Services Division at once, as I had previously.

Thank you.

11. Based on that information, SRS determined that the petitioner had been eligible for day care payments during the month of March based on his seeking employment but determined as of March 31, 1995, he was no longer eligible as he was not working and had used up his thirty days of eligibility for day care while seeking employment. The petitioner was notified of that fact on April 20, 1995.

12. On April 24, 1995, the petitioner responded to the closure as follows:

My husband [name] has recently been subcontracted to do construction work by the [Name] family. He is working as self-employed, proprietor of the registered business [corporate name]. His daily schedule is from 8 a.m. - 5pm and this workjob will continue for two more weeks. He is currently lining up work for the summer and actively seeking possible subcontract work for May.

I have enclosed two recent paychecks from his full-time employment. Child Care provided to my children [Names] are of utmost necessity at this time. For both parents are in full-time school or work. If the situation alters, for example, a wage increase [husband is currently paid \$10 per hour), I will notify SRS at once.

Copies of the paychecks accompanying this letter showed a check to the petitioner's husband dated April 7, 1995, from the named employer family for \$420 and one dated April 13, 1995, for \$335.

13. On April 28, 1995, the Department mailed a request to the petitioner specifically requesting a copy of his "current income tax forms if he is continuing self-employment. If he has been doing this for more than a year I need to see employment tax forms".

14. The petitioner responded on May 11, 1995,

During the 1994 year, [husband] had been organizing his proprietorship in ecological building before working at [the bakery] in November. As the Vermont Sales tax forms verify with the state of Vermont, [husband] earned no income in his proprietorship. His employment at [the bakery] exceeded no more than three hundred dollars a week, totaling less than \$2,500 for the 1994 tax year. The IRS does not require one to file taxes if haven't earned more than \$3,000 a year. For this reason, [husband] did not file tax return for 1994.

I am enclosing a verification letter from [the bakery]. Please let me know if there is anything else you need. At this time our children need child care services so I can finish my schooling and [husband] can continue working.

Attached to this letter was a "work-verification" letter dated December 8, 1994, from the bakery owner stating that "[husband] gets paid per week \$175-185 for contract work at my bakery."

15. The petitioner was not told that the verification was considered insufficient and that a tax form would have to be provided. Instead the denial was reviewed by the SRS, Child Care Program Supervisor who concluded that the re-application for continued care was properly denied and the petitioner was notified on June 12, 1995 that her

failure to document your husband's self-employment income, profit and loss form, for 1994 leave me no choice but to deny your application for continued eligibility based on the following regulations:

Child Care Regulation #4033 - Service Need

A service need exists when child care is necessary to support a goal of "self-support" or "protection" or "family support."

Child Care Regulation #4031 - Definitions

Self-Employment is defined as any business conducted by a primary caregiver inside or outside the home which causes a person to receive a monthly net income of at least \$100.00.

Start-up Self-Employment is defined as any activity, determined by the Commissioner or her/his designee, which is likely to lead to self-employment within one year.

16. The allegations made by the petitioner in the letter cited above were reiterated by the petitioner at hearing and are found to be an accurate reflection of the facts. The petitioner was told nothing about the \$100 per month rule during the application process. It was only with the last letter of June 12, that the petitioner understood that she could not be found eligible under SRS policies for the day care subsidy without providing a written IRS tax form. She and her husband appealed the decision and after being told that they could not fill out a mock tax form, hired a CPA to fill out a tax form for 1994 and provided it to the Department in mid-July of 1995.

17. The tax form provided by the petitioner showed that her husband made \$1,166 in self-employment income in 1994. The form was filed late with the IRS upon the CPA's advice that they should file a return. The petitioner and her husband are starting their first business and are in the process of learning what they must do as a business and were not aware that they should file a tax form. The petitioner was informed by SRS that her tax form for 1994 indicated that her husband's net self-employment income averaged only \$97 per month and could not be used to project sufficient income to find that he was gainfully self-employed during 1995.

18. The petitioner thereafter hired a CPA to do an estimated tax return for 1995. That form showed that the husband was expected to earn \$2,464 in net income from self-employment as a baker and \$2,004 from his building business in 1995 based on information supplied as of August 22, 1995. The husband is working a forty hour week in order to earn this money. Much of his time is spent finding out about and bidding on jobs which bids are only occasionally successful. The petitioner would have provided this information earlier had she known that SRS required it.

19. The 1995 estimated return was presented at the hearing and SRS has not made a response to the information in terms of whether it qualifies or disqualifies the petitioner from the receipt of benefits pursuant to her February 24, 1995 application. SRS takes the position only that this information was not supplied in a timely manner for that application.

ORDER

The decision denying the petitioner a child care subsidy for failure to document self-employment

earnings is reversed.

REASONS

The Department of Social and Rehabilitation Services has adopted regulations which require that applicant families demonstrate both financial need and a service need before child care subsidies can be paid. Child Care Services Regulations 4030-4041, Revised November 1, 1990. Those regulations establish a service need both for parents who are unemployed and seeking employment and for parents who are employed or who are self-employed⁽¹⁾ as follows:

4033 - Service Need

A service need exists when child care is necessary to support a goal of "self-support" or "protection" or "family support".

...

It shall be assumed that each primary caretaker residing in the child's home is able and available to provide child care unless a service need is established due to one of the following conditions:

a. Employment (includes self-employment)

...

f. Seeking employment

A service need for primary caretaker seeking employment shall be limited to thirty Half-Days or fifteen Full Days. Service need is limited to once in a 12 month period.

...

4031 - Definitions

Employment

Any activity inside or outside the home which causes a person to receive at least minimum wage per hour.

...

Self-Employment

Any business activity conducted by a primary caregiver inside or outside the home which causes a person to receive a monthly net income of at least \$100.00.

...

Start Up Self Employment Activities

Any activity, determined by the Commissioner or her/his designee, which is likely to lead to self-employment (see definition) within one year.

...

4034.3 - Duration of Eligibility

Eligibility for child care begins on the first day the completed application is received by the Child Care Services Division and a "Service Need" is established and an "Income Eligibility Standard" is met.

If a child was enrolled in child care prior to that date, eligibility can be backdated to the date the child was enrolled if the family was eligible and the child care provider was either licensed, registered or approved.

Retroactive eligibility will be limited to 30 calendar days.

...

Eligibility for child care services on the basis of a Service Need of "employment", "training", "incapacity", or "Family Support" will be redetermined by the Child Care Services Division at four (4) month intervals. Protective Services child care may be authorized as one component of a case plan for a period of time up to a maximum of six (6) months. Eligibility in all categories of Service Need may be redetermined at more frequent intervals, at the discretion of the Department or when a family's circumstances change or a case plan is revised following a case review.

The regulations do not contain any methodology for calculating self-employment income. From the letters sent to the petitioner it is apparent that SRS usually determines the amount of self-employment income from a review of last year's tax forms to obtain an average monthly figure, recognizing that self-employed persons do not necessarily generate income every month. However, there is nothing in the regulations which would prevent a self-employed person from showing what his actual earnings are by showing his receipts and expenses for any given month or by presenting quarterly earnings statements or projected tax liability statements. Such methods for computing self-employment income are commonly employed in other human services agency programs like ANFC or Food Stamps which have more detailed policies than used in the day care subsidy program.⁽²⁾ The emphasis is always on finding a method which will most accurately reflect the current situation.

In this case, SRS was, as a threshold issue, simply required to determine whether the petitioner was employed at any time during the month of application (February 1995) so that the family might be qualified for some level of services. The petitioner presented paychecks showing that her husband was indeed working during February of 1995. The worker's response asking for a gross income figure (which should have been a request for a net income figure), certainly led the petitioner to believe that she was providing appropriate documentation. At that point, there was no question that the petitioner's family was eligible for some level of services. It remained only for SRS to determine the number of hours for which he was eligible, but questions relevant to that issue were not asked.

In mid-March of 1995, the petitioner provided what she understandably thought was a response to the request for his gross wage figure and added that he had been laid off the job. When the Department learned of this information in mid-March of 1995 it notified the petitioner that she could not be found eligible unless she verified that her husband was working. She was not told what she should have been told--that she could be eligible if her husband was looking for employment or if she could verify the hours that her husband was spending in either employment or self-employment and show that he was netting at least \$100 per month, if self-employed. That notification would have provided the petitioner with information needed to assess her eligibility. That information could have been followed up, if necessary, with information on ways she could document her situation.

The petitioner did respond to that mid-March statement by notifying the Department in general terms that her husband was both looking for employment and engaging in self-employment. Again, at that point she should have been asked to verify the hours spent in those activities and to show that her husband netted \$100 per month. Instead, with no documentation, SRS made her retroactively eligible for benefits based on seeking employment for March and cut her off of benefits for failure to document employment. Such an action was clearly premature since it gave the petitioner no notice of what she actually needed to show and no warning that her benefits would be cut if she failed to make that showing.

Still in the dark as to what she was required to show, the petitioner sent checks to SRS showing that her husband indeed had income from self-employment in April of 1995. The petitioner at that point presented evidence which clearly indicated that he had likely netted at least \$100 for that month but was not asked, as he should have been, to verify the net amount of his income. Instead, she was told that she had to submit a tax form from 1994 in order to be found eligible. When the petitioner replied that she did not file a tax form but included verification of her husband's 1994 income through an employer's statement, the supervisor inexplicably determined that they had no choice but to deny support to the family. The fact that they had clearly documented over \$700 in self-employment income for April of 1995, was completely ignored. There is nothing in the regulations which would support SRS's action or the ultimate decision to deny.

The facts show that the petitioner responded reasonably to every request by SRS for information. The facts also show that it was SRS who was confused about the information needed in this matter and how it could be documented. The fact that the petitioner's husband bounced between working for employers, self-employment and job seeking is understandably confusing for a worker. However it is for SRS to unravel what information it needs and how it should be documented and to clearly communicate that to the applicant. The applicant has no way of knowing what to present about correct requests for the Department.

SRS should have told the petitioner up front that any child care hours she claimed for self-employment pursuits had to be supported by documentation that her husband netted \$100 per month from this pursuit. She should have been told that she could document the \$100 per month figure by presenting last year's tax return. When it was established that there was no tax return or that such a return would not have assisted in that documentation, other methods of documentation should have been explored such as monthly receipts and expenses, bookkeeping records or the like, particularly if her husband's income fluctuated greatly from month to month. The petitioner probably showed a net income of well-above \$100 for February and April through the presentation of receipts (although it cannot be said for certain since she was never asked for net income figures for those months). However, she finally, on her own initiative, obtained an estimated tax return for 1995 based on their records and prepared by an

accountant which showed that her husband would average well above the \$100 per month level from self-employment income for the entire year.

It must be concluded that the petitioner did establish that she had a service need at the time of her application which has continued at least until the date of the hearing. If SRS did not have information which was sufficiently detailed to make that decision in a timely manner, it was due to its own failure to request the pertinent information and not due to any failure on the petitioner's part. The decision denying her for failure to document the family's income from employment is reversed.

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1. A service need is also established for parents who are in training, the category under which the petitioner herself qualified. See. Id. 4033 (a). The petitioner's eligibility is not disputed in this matter.
2. For example, See F.S.M. 273.10(C), 273.11 and P-2510E(1) in the Food Stamp Program which allow a wide array of methods for calculating income including averaging for fluctuating self-employment income; and P-2122(B)(8) in the ANFC policy manual (also used for Food Stamps) which lists the following as acceptable sources of verification of earnings, including earnings from self-employment:

1. Pay stubs
2. Pay envelope
3. Statement from client's employer
4. Client's self-employment bookkeeping records
5. Employee's W-2 form
6. Income tax forms (state and/or federal)
7. Sales and expenditure records
8. Department of Employment and Training